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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE, Plaintiff and Appellant, v. JESUS MEDINA ESPARZA, Defendant and Appellant.	C083503 (Super. Ct. No. 16NCR10584)

Defendant Jesus Medina Esparza appeals his convictions for residential burglary, vehicle theft, and possession of a firearm by a felon. He contends: (1) counsel rendered ineffective assistance by misadvising him on how to replace appointed counsel with retained counsel; (2) the trial court abused its discretion by failing to make further inquiry of defendant when appointed counsel informed the court defendant's family wanted to retain private counsel; (3) retained counsel was ineffective when he based the motion for

new trial on erroneous grounds that defendant was improperly denied a *Marsden*[1] hearing; and (4) the trial court made sentencing errors under Penal Code section 654 that require remand.[2] The People cross-appeal, contending the trial court erred in striking two of defendant's prior prison term enhancements based on an erroneous application of the "washout" provision. We will stay the sentence imposed on count two. In all other respects, we affirm.

I. BACKGROUND

Cynthia, defendant's sister, was on vacation in Mexico when her sister, Rosa, called to report Cynthia's car, a GMC Yukon, was missing. Cynthia asked Rosa to contact the police to report the car stolen and to check inside the house to see if anything else had been taken. Rosa checked the house but was not sure if other items had been taken. Rosa reported the car missing.

When Cynthia returned home, she found several items missing, including a 12-gauge Benelli Shotgun and a .22-caliber rifle (a "Cricket"). She also found a note on the kitchen counter that read: "Carlos—borrowed your mom's car and got the bangers. I'm okay. I just needed some fun. Don't be mad. I'll be back." The note was signed, "Tio Jesus." Defendant did not have permission to drive the car or enter the home.

Cynthia's son, Christian, frequently used the car while his mother was in Mexico. On this occasion, while his mother was in Mexico, he had gone hunting in his mother's Yukon. He returned from hunting, threw the keys to the Yukon on the counter, and then left for a trip out of town in a different vehicle. He thought he had probably left the guns in the backseat of the car after he went hunting. Usually when he leaves the guns in the car, he leaves them in the backseat, under his hunting jacket.

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[1] *People v. Marsden* (1970) 2 Cal.3d 118.

[2] Undesignated statutory references are to the Penal Code.

California Highway Patrol Officer Richard Owens took the report from Rosa on January 5, 2016. The next morning, he saw Cynthia's missing Yukon parked in front of an auto parts store. Glenn County Deputy Sheriff Jon Owens responded to a call about the burglary and the Yukon. During a search of the Yukon, Deputy Owens found several items, including a .22-caliber Cricket rifle, and a Benelli shotgun which was partially inside a soft case, and covered by a jacket. He also found defendant's California Identification card, several casino cards, and a Home Depot card in defendant's name. Deputy Owens later received a call that defendant was at a certain house. Defendant was not there when Deputy Owens arrived, but he later found defendant hiding in a car in a garage near his mother and father's house. When he searched defendant, he found the keys to Cynthia's Yukon.

A complaint deemed an information charged defendant with first degree residential burglary (§ 459—count one); vehicle theft (Veh. Code, § 10851—count two); and two counts of being a felon in possession of a firearm (§ 29800, subd. (a)(1)—counts three and four). The complaint also alleged that defendant had served four prior prison terms. (§ 667.5, subd. (b).)

A jury found defendant guilty as charged. In bifurcated proceedings, defendant waived jury trial and admitted the four prison priors.

Defendant appeared at sentencing with newly retained counsel, Brendan Blake. Blake filed a motion for new trial on the grounds that the trial court had not given defendant a *Marsden* hearing and ineffective assistance of counsel based on a failure to investigate or call witnesses at trial. Following testimony and argument, the trial court denied the motion.

Before sentencing, the trial court sought briefing from the parties on the proper disposition of defendant's 2008 prior conviction, which had been redesignated as a misdemeanor under Proposition 47. The trial court found defendant's 2008 conviction had to be stricken, as it had been reduced to a misdemeanor, and that the two earlier prior

convictions in 2004 and 2005 also had to be stricken because of the five-year washout period.

The trial court sentenced defendant to a term of six years on the burglary (count one), a concurrent term of two years for the vehicle theft (count two), a consecutive eight months on one felon in possession of a firearm conviction (count three), and a concurrent two years on the other felon in possession conviction (count four), plus one year for the prior prison term enhancement under section 667.5, subdivision (b), for an aggregate term of seven years eight months.

II. DISCUSSION

A. Ineffective Assistance of Counsel and Choice of Counsel

Defendant raises a number of claims related to his representation at trial. He contends he received ineffective assistance of counsel when appointed counsel misadvised him that he had to file a *Marsden* motion to discharge appointed counsel and replace him with retained counsel. The record does not support this claim. He separately argues the trial court erred in refusing to allow defendant to request a discharge of retained counsel. The record does not support this claim. Defendant also argues that retained counsel was ineffective in basing the motion for new trial on the erroneous ground that the trial court denied defendant his right to a *Marsden* hearing. We find no prejudicial error.

1. Background

At the February 5, 2016, hearing, defendant stated he wanted to address the court. The trial court told him he had to address the court through his attorney. Defendant stated he had not had time to speak with his attorney about his first amendment rights or freedom of speech. There is no indication in the record this statement was about defendant's representation.

At the April 14, 2016, trial readiness conference, appointed counsel, Albert Smith, informed the trial court that defendant had advised him "that the family wishe[d] to hire

private counsel, but no one ha[d] been retained yet." The trial court asked if the matter was ready to go to trial, and Smith informed the trial court it was. The clerk's minutes reflect the family wanted to retain private counsel, and defendant "wishe[d] to 'fire' [attorney] Smith."

Sometime after trial, defendant retained counsel Brendan Blake. On June 27, 2016, Blake filed a motion for new trial. As grounds for new trial, the motion asserted defendant "attempted on several occasions to request a '*Marsden* hearing,' the court was never notified and the hearing did not take place."[3]

Smith testified at the hearing on the motion for new trial. Defendant had "wanted to hire his own attorney, and he made that clear at the trial confirmation setting." Defendant "stated he did not want his trial confirmed because he wanted to hire private counsel." Smith advised defendant that "the Court would want to know who, when, and where, before the court would act to change a trial date." Trial was set for April 25, 2016, approximately 12 days after the trial readiness conference.

Defendant also repeatedly asked Smith how to do a *Marsden* motion. Defendant sent Smith a letter dated April 15, that he wanted Smith to deliver to the trial court. The letter stated, "The purpose of this letter is to ask for a *Marsden* Act motion . . . . My new attorney has tried to [a]ppear to the court to take over and he [h]as told me about the Marsden Act motion and I understand that with your [a]pproval I can hire [a] new attorney. Your Honor will you please allow me to hire an attorney and continue my case." On April 19, 2016, defendant also called Smith's office from jail "asking for atty to file a Marsden motion for him." (Emphasis omitted.) This was one of five or six calls to Smith's office, in which defendant asked appointed counsel for a *Marsden* motion.

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[3] Defendant also claimed ineffective assistance of counsel based on Smith's failure to investigate and call particular witnesses. This is not an issue raised on appeal, and therefore, we do not discuss it.

Three or four of those calls were made prior to the trial readiness conference. Smith advised defendant that he had to address "the Court with a *Marsden* motion and that the Court would conduct—I wouldn't call it 'secret,' but in-camera proceedings with regard to that issue." (Italics added.)

At the hearing on the motion for new trial, Blake argued the evidence demonstrated defendant had made a request for a *Marsden* motion, and that he attempted on several occasions to inform Smith he wanted a *Marsden* hearing. The prosecution argued defendant made a number of comments indicating he wanted a new attorney and was going to hire one, but never indicated he had a basis for disagreement with appointed counsel or made a claim of inadequate representation of appointed counsel. The prosecution also argued it was not clear whether defendant was trying to make an "actual *Marsden* motion or just a request to retain private counsel." (Italics added.)

The trial court noted with respect to a *Marsden* hearing, "[t]ypically, the defendant makes an oral motion before the Court. The defendant must clearly indicate he wants a substituted attorney. A trial judge must conduct a hearing on a *Marsden* request and allow defendant to specify reasons for the requested dismissal." After reviewing the transcripts of each hearing, the trial court found "nowhere indicates a request for a Marsden hearing. And as I—Again, I point out, typically the defendant makes an oral motion before the Court. The defendant must clearly indicate he wants a substitute attorney, not that he wants to retain other counsel; that he wants a substitute attorney." Finding the claim that there had been a failure to hold a *Marsden* hearing was not supported by the record, specifically because there was no indication in the record defendant had tried to make a *Marsden* motion, the trial court denied the motion for new trial on this ground.

2. Ineffective Assistance of Appointed Counsel

Defendant contends appointed counsel misadvised him that he had to file a *Marsden* motion to discharge appointed counsel and replace him with retained counsel. He claims this misadvisement resulted in ineffective assistance of counsel.

To establish a claim of ineffective assistance of counsel, the defendant must show by a preponderance of the evidence that (1) his or her counsel's performance was deficient under prevailing professional norms, and (2) it is reasonably probable the defendant would have realized a more favorable result absent the deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692 [80 L.Ed.2d 674] (*Strickland*).) Our review of counsel's performance begins with the presumption that appointed counsel provided proper advice and competent representation, " 'that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties.' " (*United States v. Cronic* (1984) 466 U.S. 648, 658, fn. 23 [80 L.Ed.2d 675].) Defendant must overcome the presumption that, under the circumstances, the challenged action might be considered reasonable. (*Strickland, supra*, at p. 690; *People v. Jones* (2010) 186 Cal.App.4th 216, 235.)

Here, defendant has failed to establish that appointed counsel's performance was deficient. The record shows defendant made clear at the April 14 trial readiness conference that he wanted to "fire" Smith and hire his own attorney. But, he did not retain an attorney until after the trial. The only indication in the record that appointed counsel gave any advisements regarding retained counsel was the advice to defendant that to obtain a *continuance* to retain private counsel, defendant would have to let the court know "who, when, and where." The record also indicates defendant repeatedly told appointed counsel he wanted a *Marsden* hearing. Appointed counsel repeatedly advised defendant how to make such a motion. Defendant did not follow that advice and did not tell the court he wanted such a hearing. The only indication in the record that defendant was advised he had to make a *Marsden* motion *before* retaining counsel on his own is in

the letter dated April 15, 2016, in which he claimed his new attorney "[had] told [him] about the Marsden Act motion" and defendant understood that he could hire a new attorney with the court's approval. To the extent defendant was misadvised about the procedure for retaining private counsel, this evidence suggests it was defendant's "new attorney" that misadvised him, not appointed counsel.

Defendant has cited no authority, and we have found none, that requires defense counsel to do more than appointed counsel did here. Nothing appointed counsel did prevented or inhibited defendant from being able to retain counsel. Because defendant has not shown that appointed counsel misadvised defendant, we reject the claim that appointed counsel's "performance was deficient when measured against the standard of a reasonably competent attorney." (*People v. McDermott* (2002) 28 Cal.4th 946, 987-988.) As such, we also reject defendant's claim of ineffective assistance of counsel. (*Ibid.*)

3. Request for Retained Counsel

Defendant contends the trial court abused its discretion in refusing to conduct an inquiry into defendant's requests for retained counsel and failing to continue the matter to allow defendant to retain counsel. He claims this abuse of discretion deprived him of his right to be represented by counsel of his choosing.

Defendant is correct that the right to counsel (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15) "encompasses the right to retain counsel of one's own choosing." (*People v. Holland* (1978) 23 Cal.3d 77, 86, overruled on a different ground by *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7, 1098, fn. 9.) "[T]hough it is clear that a defendant has no *absolute* right to be represented by a particular attorney, still the courts should make all reasonable efforts to ensure that a defendant financially able to retain an attorney of his own choosing can be represented by that attorney." (*People v. Crovedi* (1966) 65 Cal.2d 199, 207, fn. omitted.) The right to counsel of one's choosing " 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, . . .' [Citation.]" (*People v.*

Courts (1985) 37 Cal.3d 784, 790.) The trial court is required to keep to "a necessary minimum its interference" (*Crovedi, supra,* at p. 208) with defendant's right to counsel of his own choosing, and "we demand of trial courts a 'resourceful diligence directed toward the protection of [the right to counsel] to the fullest extent consistent with effective judicial administration.' ([*Id.*] at p. 209.)" (*People v. Ortiz* (1990) 51 Cal.3d 975, 982-983.)

Defendant is entitled to counsel of his own choosing and does not need the trial court's permission to hire that attorney. Demonstrating a commitment to minimizing the trial court's interference in a defendant's decisions of how best to defend himself, including his choices as to what attorney represents him, is very different from imposing a duty of inquiry on the trial court. None of the authorities above, or those cited by defendant, suggest the trial court has a duty to inquire about defendant's desire to retain counsel of his own choosing and substitute that counsel for appointed counsel. We will not create one now.

The cases cited by defendant involve the trial court's exercise of discretion in determining whether to grant a continuance to facilitate representation by private counsel. Two weeks before trial, defendant indicated he wanted to retain private counsel and fire appointed counsel; yet, he did not do so before trial. Nor did defendant make a motion for a continuance to facilitate hiring private counsel. Accordingly, the trial court did not exercise its discretion on this issue, let alone abuse it. To find an abuse of discretion on appeal, there must be a ruling on which the trial court exercised its discretion. The failure to make a motion and secure a ruling forfeits the claim on appeal. (See *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1156; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 371.)

4. Ineffective Assistance of Retained Counsel

Defendant contends retained counsel rendered ineffective assistance of counsel in the motion for new trial by erroneously asserting defendant was denied his right to a

Marsden hearing. He argues this was inadequate representation, as adequate legal research would have revealed the proper grounds for the motion for new trial was: (1) appointed counsel's erroneous advice regarding the need for a *Marsden* hearing to replace appointed counsel with retained counsel; and (2) the trial court denying defendant the opportunity to be represented by counsel of his own choosing. As discussed, *ante*, neither ground has merit. The record does not support the claim that appointed counsel gave erroneous advice to defendant regarding replacing him with retained counsel. And, the trial court had no duty to inquire about defendant's stated desire for retained counsel and made no ruling denying defendant the opportunity to retain private counsel. Counsel does not render ineffective assistance by failing to raise arguments, motions, or objections that are groundless. (See *People v. Boyette* (2002) 29 Cal.4th 381, 437; see also *People v. Memro* (1995) 11 Cal.4th 786, 834; *People v. Price* (1991) 1 Cal.4th 324, 387.)

B. Section 654

Defendant contends the trial court erred in imposing a concurrent sentence on defendant's vehicle theft conviction (count two) and a consecutive sentence on one count of being a felon in possession of a firearm (count three). The People properly concede the sentence for vehicle theft should be stayed under section 654 but argue the trial court acted within its discretion in imposing a consecutive term on being a felon in possession of a firearm.

Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Correa* (2012) 54 Cal.4th 331, 335, 337.) Whether a course of conduct is divisible turns on the defendant's intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) If all the crimes committed pursuant to that course of conduct are merely incidental to or were the means of accomplishing or facilitating a single objective, the defendant may receive only one punishment. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *People v. Islas* (2012) 210 Cal.App.4th 116,

129.) Whether a defendant harbored a separate intent and objective for each offense is a factual determination for the trial court. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) When a trial court sentences a defendant to separate terms without making an express finding the defendant acted pursuant to separate objectives, that court is deemed to have made an implied finding that each offense had a separate objective. (*Islas, supra,* at p. 129.) We review these findings for substantial evidence " 'in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.' " (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.)

Section 654 precludes "punishment for both burglary and theft where, as in this case, the burglary is based on an entry with intent to commit that theft." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) The parties agree that here the entry to the home was committed with the intent to steal, and stealing the vehicle was incidental to that intent, not separate from it. There is no basis in the record on which the trial court could conclude defendant had separate intents and objectives as to the burglary and the vehicle theft. Accordingly, the sentence on count two, the vehicle theft, must be stayed.

As to being in possession of a firearm, however, we find substantial evidence supports the trial court's implied finding of separate intents and objectives. There is no evidence defendant knew the guns were in the Yukon when he burglarized the home and stole the car keys. To the contrary, the evidence is that Christian had left the guns in the Yukon after hunting that morning, something defendant would not have known. Accordingly, substantial evidence supports a conclusion defendant formed the intent to possess the guns after he burglarized the home. The circumstances of defendant's possession of the guns and the commission of the burglary raise a reasonable inference that his possession of the guns was not merely simultaneous with the burglary, or incidental to it, but separate from it. "Section 654 therefore does not prohibit separate punishments." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413.)

C. Application of Five-Year "Washout" Period

The People cross-appeal and contend the trial court improperly struck two of defendant's prior prison term enhancements based on an erroneous application of the section 667.5, subdivision (a) "washout" period.

In bifurcated proceedings prior to trial, defendant admitted four prior prison term enhancements. The convictions were: (1) a May 2004 conviction for being a felon in possession of ammunition; (2) a November 2005 conviction for evading a police officer; (3) a September 2008 conviction for possession of drugs; and (4) a May 2013 conviction for passing false checks.

After trial, defendant made a motion to redesignate the 2008 drug conviction as a misdemeanor under Proposition 47. The trial court asked for briefing from the parties on the effect of that redesignation on the five-year washout period under section 667.5, subdivision (b). The probation report indicated defendant had been sentenced to a two-year term on the May 2004 conviction, and a two-year term on the November 2005 conviction. In December 2006, defendant violated parole and was ordered to finish the term. After briefing and argument, the trial court found because of the redesignation of the 2008 prior conviction, the five-year washout provision applied to defendant's 2004 and 2005 prior prison term enhancements. Accordingly, the trial court only imposed sentence on the 2013 prior prison term enhancement.

Section 667.5, subdivision (b) imposes a one-year enhancement for a prior, separate prison term served on a felony conviction. "Imposition of a sentence enhancement under . . . section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) "Section 667.5, subdivision (b), provides for a one-year sentence enhancement on a new felony conviction resulting in a prison

sentence where the defendant has previously been convicted of a felony and served a prison term. The enhancement is imposed for 'each prior separate prison term . . . for any felony.' Under the washout provision, however, the enhancement is *not* imposed if the defendant is free of both felony convictions and incarceration in prison for five years following release from the previous incarceration. (§ 667.5, subd. (b).)" (*People v. Warren* (2018) 24 Cal.App.5th 899, 909; see *People v. Kelly* (2018) 28 Cal.App.5th 886, 896.) Once the conviction becomes a misdemeanor for all purposes, "it can no longer be said that the defendant 'was previously convicted of a felony,' " a necessary element for imposing a section 667.5, subdivision (b) enhancement. (*People v. Buycks* (2018) 5 Cal.5th 857, 889.) Thus, " 'if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole, the enhancement does not apply.' " (*Ibid*.) *Buycks* did not directly address this issue, *Buycks* disapproved *People v. Acosta* (2016) 247 Cal.App.4th 1072, to the extent that it held that "the 'misdemeanor for all purposes' language of section 1170.18, subdivision (k) alters only the status of felony convictions, not the fact that the defendant has served a qualifying prior felony prison term for purposes of a section 667.5, subdivision (b) enhancement." (*Buycks, supra,* at p. 889, fn. 13; *Kelly, supra,* at p. 902.)

While only issues actually decided by the Supreme Court are fully binding as precedent, even dicta from the Supreme Court is persuasive. Generally speaking, we "follow dicta from the California Supreme Court." (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) This is especially true when, as here, "the Supreme Court has conducted a thorough analysis of the issues and such analysis reflects compelling logic." (*Ibid.*) Consequently, we accept the conclusion of our Fifth District colleagues that "the broad interpretation of Proposition 47 by the California Supreme Court indicates that it should likewise apply to mitigate the effects of the washout rule." (*People v.*

Kelly, *supra*, 28 Cal.App.5th at p. 901; see *People v. Warren*, *supra*, 24 Cal.App.5th 899 at p. 904.)

The trial court properly struck defendant's 2008 prison prior based on its redesignation as a misdemeanor and properly struck the 2004 and 2005 prison priors as beyond the five-year washout period. There is no indication in the record defendant has any other felony convictions in the relevant period that would overcome the washout rule.

III. DISPOSITION

The sentence on count two is stayed. As modified, the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

/S/

RENNER, J.

We concur:

/S/

BUTZ, Acting P. J.

/S/

HOCH, J.